

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-4005

Nos. 77-4005, 77-4010, 77-4059

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INTERNATIONAL BUSINESS MACHINES CORPORATION,
et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

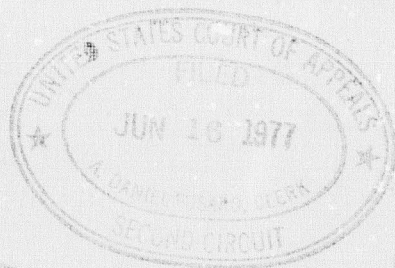
Respondents,

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
et al.,

Intervenors,

On Petitions For Review Of An Order
Of The Federal Communications Commission

BRIEF FOR PETITIONER COMPUTER AND BUSINESS
EQUIPMENT MANUFACTURERS ASSOCIATION



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March 24, 1977

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BRIEF FOR PETITIONER COMPUTER AND BUSINESS
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JURISDICTIONAL STATEMENT

These consolidated cases were initiated by petitions for review of an Order of the Federal Communications Commission (hereinafter "Commission" or "FCC"). Jurisdiction is vested in this Court by Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. §402(a) and 28 U.S.C. §2344.

QUESTIONS PRESENTED

Where a Rule requiring communications common carriers to accompany tariff filings with detailed explanatory information is intended to prevent the institution of unlawful charges to the public, did the Commission abuse its discretion by failing, without explanation or investigation, to enforce that Rule?

Where litigants before the agency have raised substantial public interest issues concerning the compliance of proposed common carrier tariff rates with agency policies against anticompetitive cross-subsidies, did the Commission abuse its discretion by permitting the challenged rates to become effective without any reasoned consideration of those issues? ^{*/}

REFERENCE TO RULING

The ruling of the Commission under review in these cases is a Memorandum Opinion and Order released on January 5, 1977 (FCC-76-1199) in the matter of American Telephone and

^{*/} In its pleadings before the Commission, CBEMA argued, in addition to the matters addressed herein, that the Bureau had correctly concluded the Dataspeed 40/4 offering to be a data processing, not a communications service. (E.g., J.A. 694-96.) The error of the Commission's conclusion to the contrary is fully set forth in the Brief for Petitioner International Business Machines Corporation in Case No. 77-4005. CBEMA endorses both the questions presented, and the arguments submitted, therein.

Telegraph Company, Transmittal No. 12449 (hereinafter cited "Order"). The Order, which reversed a decision of the Commission's Common Carrier Bureau, refused to reject as unlawful, to suspend and investigate, or to grant other relief requested concerning, proposed tariff amendments by American Telephone and Telegraph Company (hereinafter "AT&T") relating to a device named the "Dataspeed 40/4". Both the Commission's Order and the Common Carrier Bureau's decision are reproduced in the Joint Appendix. (J.A. 969,644.)

STATEMENT OF THE CASE

This case presents for review an action of the Commission permitting to become effective an interstate tariff filed by AT&T for the provision of a computer terminal device called the "Dataspeed 40/4". In order that the issues presented the Court herein can be fully illustrated, an understanding of the overall context in which the AT&T tariff was considered below is essential.

A. The Commission's Tariff Review Processes

The Commission's basic mandate is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide and worldwide wire and radio communication service with adequate facilities at reasonable

charges." 47 U.S.C. §151. With respect to communications common carriage, entry into the field is subject to the Commission's certificating process under Section 214 of the Communications Act of 1934, as amended (hereinafter "the Act"), 47 U.S.C. §214. Once authorized, carriers must file tariffs with the FCC, and their services may only be provided in strict accordance with those tariffs. 47 U.S.C. §203(a), (c). The Act demands that all "charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable." 47 U.S.C. §201(b). Any unjust unreasonable or unreasonably discriminatory provision of service is specifically "declared to be unlawful." 47 U.S.C. §§201(b), 202(a).

To assure an opportunity to forestall the institution of unlawful services, or to investigate their propriety where questions of lawfulness have been raised, the Act requires that notice be given, both to the Commission and to the public, before proposed carrier services may be initiated. As enacted in 1934, Section 203(b) provided that tariffs filed could not become effective "except after thirty days' notice to the Commission and to the public." The purpose of the waiting period is "to give the public the opportunity to review the tariff and to make any pertinent comments. It is further intended to provide the FCC time to study the tariff as well as any comments received from the public." American Tel. & Tel. Co. v. FCC, 503 F.2d 612, 614 (2d Cir. 1974).

The thirty-day period was reflected in the FCC's regulations for some 30 years. In 1970, however, in the exercise of its rulemaking powers, the Commission extended the notice period to 60 days. In the Matter of Amendment of Part 61 of the Commission's Rules Relating to Tariffs and Part 1 of the Commission's Rules Relating to Evidence (hereinafter cited "Tariffs-Evidence"), 25 F.C.C. 2d 957, 971-72 (1970), recon. denied, 40 F.C.C. 2d 149 (1973), aff'd sub nom. American Tel. & Tel. Co. v. FCC, 503 F.2d 612 (2d Cir. 1974). In light of the increasing number and complexity of tariffs being filed, the Commission determined, the prior time period was inadequate to permit either the public or the Commission an opportunity for meaningful review and analysis.

...The intent of having a requirement that tariff filings will not become effective until after the expiration of a certain period is to afford the public and the Commission sufficient notice of the filing. ... The notice period must by necessity be of sufficient duration so that, among other things, the tariff filing may be examined by the Commission and the public to determine whether the tariff filing meets the requirements of the Commission's rules and the Act and whether the legal remedies of rejection or suspension and designation for hearing should be sought by the public or imposed by the Commission. If the notice period is too short, there will not be enough time in which to make this type of evaluation.

Tariffs Evidence, supra, 25 F.C.C. 2d at 970-71

The notice period was further extended by Congress in 1976, in response to a Commission request for legislation. In support of a proposal to lengthen the Section 203(b) notice period to 90 days, FCC Chairman Richard Wiley pointed out the inadequacy of the statutory 30-day period, and affirmed the Commission's intent, in seeking the requested legislation, "to foster a regulatory framework in which the interests of consumers and carriers may be placed in balance and each afforded equitable treatment." Hearings on S.2054 Before the Senate Committee on Commerce, 94th Cong., 1st Sess. 6-7 (1975). Observing that "[n]either the Commission nor interested parties can be expected to review and analyze [contemporary tariff] filings within the constraints of the existing 30-day notice period," S. Rep. No. 94-918, 94th Cong., 2d Sess. 2 (1976), Congress adopted the Commission's proposal.

Based on public comments received during the statutory notice period, and on its own evaluation, the Commission is empowered to take certain remedial action vis-a-vis tariffs filed. It may reject the tariff for patent unlawfulness. American Tel. & Tel. Co. v. FCC, 487 F.2d 864, 880, n.33 (2d Cir. 1973); Municipal Light Boards v. FPC, 450 F.2d 1341, 1346 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972). Or it may suspend the tariff (in whole or in part) up to five months and

conduct an investigation where questions of lawfulness appear. 47 U.S.C. §204. American Tel. & Tel. Co. v. FCC, 487 F.2d 864, 871 (2d Cir. 1973).

Central and critical to the entire tariff notice and review process is Section 61.38 of the Commission's Rules. 47 C.F.R. §61.38. It is that regulation which requires carriers to file information on the basis of which the public and the Commission must determine the nature and effect of the tariff proposal. And it is that information on which the Commission must ultimately base its public interest judgment where questions are raised concerning a particular tariff filing.

In its current form, Section 61.38 requires that carriers filing tariffs include with their filings supplemental information which fully explains "the reasons for the filing," "the basis of ratemaking employed," and certain specified supporting "economic data and information." 47 C.F.R. §61.38(a). Work papers which "contain the information underlying the data supplied" are also to be filed with the Commission and made "available for use by the public." 47 C.F.R. §61.38(b). To the extent proposed tariff rates "must be able to withstand the statutory tests of Section 201(b) and 202(a) of the Act," the Commission through Section 61.38 requires "that a rate be supported by sufficient information to indicate that the rate has prima facie support." Tariffs-Evidence, supra, 25 F.C.C. 2d at 965. Indeed, such information is "basic to the formulation of the

essential regulatory judgments [the Commission] must make."

Ibid.

During the past decade, as the variety of telecommunications services has increased, and as competition has grown in segments of the communications common carrier field, the Commission has been increasingly attentive to the need to assure the integrity of both monopoly and competitive service charges to the public. Indeed, it has devoted major recent efforts to enforcement of a fundamental policy against the use of monopoly service revenues to subsidize competitive service offerings by monopoly carriers.^{1/} The Commission's objectives have been both to prevent anticompetitive effects on lawfully established competitors of the monopoly carriers in specialized segments of the telecommunications field, and to protect as well the interests of the public which uses (and pays for) monopoly telephone and telegraph services.^{2/}

The Section 61.38 requirements were adopted with such considerations specifically in mind. The Commission made clear

^{1/} See, e.g., AT&T - Hi-Lo, 55 F.C.C. 2d 224 (1975), 58 F.C.C. 2d 362 (1976); AT&T - WATS, 59 F.C.C. 2d 671 (1976); AT&T - Dataphone Digital Services, 62 F.C.C. 2d 815 (1976) (Initial Decision) 62 F.C.C. 2d 744 (1977); (Final Decision), AT&T - Telpak, 61 F.C.C. 2d 587, 608-09 (1976).

^{2/} See, e.g., Land Mobile Services in the 900 MHz Frequency Band, 51 F.C.C. 2d 945, 951 (1975), aff'd NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976).

that the information which the Rule required to accompany tariff filings was intended to permit an identification of any cross-subsidy problem early enough that meaningful remedial measures could be taken:

[I]t is particularly important to obtain the data required by [Section 61.38] where questions are raised as to whether a new or reduced rate competitive service is being cross-subsidized by other services and whether there is factual support for allegations of anticompetitive impact from such rates.

40 F.C.C. 2d 149,153.

B. The Commission Proceedings Below

On November 18, 1975, AT&T filed the tariff revisions which initiated the controversy below. Basically, the tariffs proposed the offering of a new service consisting, primarily, of the provision of a terminal device -- called a Dataspeed 40/4 -- in conjunction with various transmission facilities. As described in AT&T's transmittal letter to the Commission (J.A. 232.), Dataspeed 40/4 service offers a high speed printer to print out information from a computer, a typewriter-like device where an operator can type in information or instructions, a visual display device for viewing information to be sent or received, and mini programming devices which control the transactions from a cluster of printers and keyboard input devices. The cluster control devices are the chief components of Dataspeed 40/4 service and

competing offerings since they organize the transmissions of the input and output devices to obtain optimal interactive operation between the dataspeed 40/4 device and the rest of the computer system.

Because of the nature of the Dataspeed 40/4 device, its proposed offering by AT&T pursuant to tariff raised a number of serious issues below. AT&T itself termed it "one of the most important common carrier matters which has come before the Commission." (J.A. 655.) First, a fundamental question existed whether AT&T could lawfully offer the Dataspeed 40/4 in any fashion. If the offering were in fact a data processing or "hybrid data processing" service, rather than a communications service, the Commission's so-called Computer Inquiry^{3/} policies would require its being offered on a non-tariff basis, through a separate, arms-length subsidiary company. Yet a 1956 antitrust consent decree would preclude AT&T's offering the service on that basis as well.^{4/} Second, even if the Dataspeed 40/4 were a communications offering properly tariffable by AT&T, issues were raised whether the rates to be charged for the

^{3/} Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, 28 F.C.C. 2d 291 (1970), 28 F.C.C. 2d 267 (1971), aff'd in part sub nom. GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973).

^{4/} United States v. Western Electric Co., Inc. and AT&T, 1956 Trade Cases ¶¶71, 134 (D.N.J. 1956).

proposed service were consistent with Commission policies prohibiting the cross-subsidizing of competitive service offerings monopoly service revenues.

On December 15, 1975, objections to AT&T's tariff were filed with the Commission by CBEMA (J.A. 397.) and by IBM (J.A. 413.).^{5/} In a "Petition for Relief" (J.A. 397.), CBEMA pointed out the serious questions raised by the tariff filing, and challenged the sufficiency of AT&T's supporting information, submitted in response to Section 61.38 of the Rules, to permit a resolution of those questions. Among other things, CBEMA pointed out that AT&T's materials omitted any information on preservice costs, any details on the cost methodology used in its rate development, and any justification for the marketing estimates offered. To the extent such data was necessary to resolve readily apparent cross-subsidy issues, CBEMA urged the Commission to obtain necessary additional information from AT&T so that a meaningful analysis of the tariff could be made under applicable Commission policies. (J.A. 405-08.)

^{5/} In its "Petition to Reject or Suspend", IBM contended among other things, that the proposed AT&T service would be an improper offering of data processing services or equipment in violation of the Commission's Computer Inquiry policies and the 1956 AT&T consent decree. (J.A. 414-23.) IBM requested the Commission to reject, or to suspend and investigate, the AT&T tariffs. A similar petition was filed on January 2, 1976 by the Computer and Communications Industry Association. (J.A. 445.).

In terms of relief, alternative remedies were requested, each of which was designed to permit an adequate evaluation of the tariff before it became effective. CBEMA first urged rejection of the tariff for failure to comply with Section 61.38 of the Rules, with a concurrent directive that any resubmission by AT&T be accompanied by full disclosure of the necessary information. (J.A. 410.) Alternatively, CBEMA requested that the Commission, pursuant to Section 203(b) of the Act, 47 U.S.C. §203(b), require a postponement of the tariff's effective date and direct AT&T to produce the required additional data for review during that extended notice period. (J.A. 411-12.) Finally, suspension of the tariff pursuant to Section 204 of the Act, 47 U.S.C. §204, with a concurrent order for the submission of the Section 61.38 information during the suspension period, was requested as a third alternative. (J.A. 412.) Failure to pursue any of the recommended courses of action, CBEMA contended, would result in a public interest judgment made without a full understanding of critical aspects of the tariff. (J.A. 408-10.)

Following the submission of further pleadings by all of the parties, the Commission's Common Carrier Bureau recognized both the complexity of the issues raised, and the insufficiency of AT&T's Section 61.38 supporting information to provide an

adequate basis for an informed Commission judgment prior to the tariff's February 2, 1976 effective date.^{6/} The Bureau Chief directed AT&T to delay implementation of the service to March 3, 1976.^{7/} And the Bureau took steps to try to obtain the additional data required in the interim. AT&T was asked to submit additional documentation (J.A. 626.), and to respond to questions concerning the Dataspeed 40/4 (J.A. 633.).^{8/}

^{6/} The tariff, originally scheduled to become effective December 18, 1975, had first been deferred by AT&T to January 17, 1976, at the Common Carrier Bureau's request. That date was subsequently extended by AT&T to February 2, 1976. (J.A. 456.)

^{7/} In his letter to AT&T on January 29, 1976, the Bureau Chief stated, in part (J.A. 624-25.):

...CBEMA challenges the adequacy of the economic data submitted by AT&T as required by the Commission Rule 61.38. It is CBEMA's contention that the AT&T filing is deficient in the following respects: 1) lack of (a) underlying working papers to support the analysis and reports submitted, (b) market application and market projection plans, (c) functional data with respect to the operation of the data speed [sic] 40; 2) the extent and method of costing used, i.e., fully allocated costs vs. incremental costs is not adequately shown.

The foregoing contentions raise substantive and complex issues which merit careful consideration by the Commission

^{8/} In addition, at the Bureau's request, arrangements were made for the Bureau's on-site inspection of operating terminal equipment, and for the accumulation of written literature. (J.A. 480, 622.)

By Memorandum Opinion and Order released March 3, 1976, the Common Carrier Bureau rejected AT&T's tariff. (J.A. 644.) Based on its analysis, the Bureau concluded that the Dataspeed 40/4 represented the offering of a data processing, not a communications, service. Since the Commission's Computer Inquiry decision permitted the offering of such services by common carriers only through a separate corporate entity, 47 C.F.R. §64.702, the Bureau found the tariff to be inconsistent with that requirement, and hence "unlawful on its face."

(J.A. 650.)

In its decision, the Bureau noted CBEMA's arguments concerning Section 61.38 and cross-subsidy and found that "the costs associated with [the Dataspeed 40/4's] design, development and manufacture, as submitted with this tariff filing, are not clearly separable from monopoly or other regulated common carrier activities." (Ibid.) As a result, it was concluded, "the material submitted does not permit us to determine whether [the Dataspeed 40/4's] development costs are subsidized." (Ibid.) Without further explanation, however, the Bureau also fashioned a separate, two-sentence disposition relating to Section 61.38 at paragraph 22 of its decision (Ibid.):

... CBEMA contends that the cost justification submitted is insufficient and violates Section 61.38 of the Rules. Since AT&T has submitted additional material at our request to support statements made in its original filing, we consider the material not violative of Part 61 of our Rules.

Because of the inconsistency of that ruling with the Bureau's contemporaneous findings and conclusions on cross-subsidy, CBEMA petitioned for Commission review of paragraph 22, in the event the Commission disagreed with the Bureau's stated basis for rejecting the tariff. CBEMA contended that Section 61.38 required the submission by carriers of precisely the information which the Bureau said was missing -- material by which a cross-subsidy claim could properly be judged -- and it explained anew the absence of preservice costs and marketing materials necessary to any lawful approval of AT&T's proposed Dataspeed 40/4 rates. (J.A. 696-700.)^{9/} Even if the Commission were to reverse the Bureau's finding that the Dataspeed 40/4 was a data processing service, CBEMA argued, AT&T's lack of compliance with Section 61.38, and even more fundamentally, the unresolved question of cross-subsidy, nonetheless compelled either rejection or suspension and investigation of the tariff. (J.A. 704-05.)

In the Commission decision here under review, CBEMA's having requested "rejection or suspension" of the tariff on the grounds of AT&T's non-compliance with Section 61.38 was noted. (J.A. 974.) The Bureau's decision was characterized as having

^{9/} CBEMA also argued its entitlement to what the Bureau had failed to provide -- a reasoned disposition of CBEMA's claims concerning Section 61.38, one which would make clear both the requirements of the Rule and the specific AT&T materials which were deemed to have satisfied the Rule in that case. (J.A. 702-03.)

found Section 61.38 adequately satisfied to avoid rejection, but the Commission pointed out that the Bureau was "silent" on the adequacy of the Section 61.38 information for any other purposes. (Ibid.) On the former matter, the Commission ruled that "no basis for rejection exists." (J.A. 983.) Having "reviewed the supporting material," the Commission stated, it "agree[d] with the Bureau Chief that no prima facie showing of unlawfulness has been made which would merit rejection." In point of fact, the Commission had "reviewed" none of the "supporting material" submitted by AT&T after its initial tariff filing.^{10/}

With respect to AT&T's compliance with Section 61.38 for purposes of determining the appropriateness of suspension, or any other of the alternative forms of relief CBEMA had requested, the Commission's decision was silent. Moreover, all concerns relating to unlawful cross-subsidy were summarily dismissed. While acknowledging CBEMA's argument that a serious question existed "that the offering of the Dataspeed 40/4 service may, in fact, be subsidized by other regulated and monopoly communication services," the Commission simply stated, without any further explanation, that CBEMA's contentions "address problems which are beyond the scope of Section 61.38." (J.A. 983.)

^{10/} See, Stipulation of counsel in Case No. 77-4059, dated March 10, 1977 (A-13).

Judicial appeals from the Commission's decision immediately ensued. Following a denial of stay requests by the Commission (J.A. 989) and by this Court, AT&T's tariffs -- which had been refiled on the day the Commission's decision was released -- became effective.

SUMMARY OF ARGUMENT

I

Section 61.38 of the Commission's Rules, 47 C.F.R. §61.38, was specifically adopted to provide the Commission with sufficient information to determine, in advance of their becoming effective, the lawfulness of proposed tariff charges to the public for communications services. Particularly where questions of potential improper cross-subsidy among different communications services have been raised, the Commission has insisted that complete data be furnished, on the basis of which any potential anticompetitive factors can be evaluated. Failure to comply with the requirements of Section 61.38 has been the basis for the rejection of tariffs filed, or for their suspension and investigation.

In the proceedings below, AT&T failed to provide the type of detailed information required by Section 61.38 concerning the proposed Dataspeed 40/4 rates. And the absence of that data precluded a valid Commission determination that the rates were not improperly cross-subsidized. In light of both the literal

terms of Section 61.38 and its stated purpose, the Commission's summary conclusion that AT&T had satisfied the Section 61.38 requirements was in error, and was an abuse of discretion.

II

In the proceedings before the Commission, substantial issues requiring reasoned agency disposition were raised by CBEMA. AT&T's failure to satisfy either the letter or the spirit of Section 61.38 was detailed. Substantive issues concerning apparent cross-subsidies of the proposed Dataspeed 40/4 rates were squarely posed. And alternative forms of relief, all designed to permit a resolution of the cross-subsidy issues before implementation of the Dataspeed 40/4 service, were requested.

The Commission directly confronted none of these matters. Without any adequate statement of reasons, the Commission summarily concluded that AT&T had sufficiently complied with Section 61.38 so that rejection of the tariff was not compelled. The Commission made no determination with regard to the substantive questions of cross-subsidy. And it did not address the need for any of CBEMA's alternative requests for relief. The Commission's failure to explain its conclusion with respect to AT&T's compliance with Section 61.38, and its failure to have considered either the issue of cross-subsidy or the appropriateness of CBEMA's alternative requests for relief, preclude effective judicial review, and require a remand to the Commission for further proceedings.

ARGUMENT

I. The Commission's Refusal To Reject AT&T's Dataspeed 40/4 Tariff For Failure to Comply With Section 61.38 Of The Commission's Rules Was An Abuse of Discretion

The powers conveyed by Congress with respect to tariff filings are among the Commission's most important tools in its regulation of interstate communication services. Section 203 of the Act requires that common carriers file with the Commission tariffs for interstate services "showing all charges for itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges," and forbids the furnishing of services other than in accordance with those tariffs. 47 U.S.C. §203(a), (c). The Act also declares unlawful "charges, practices, classifications, and regulations" which are unjust, unreasonable or unreasonably discriminatory. 47 U.S.C. §§201(b), 202(a). To assure that unlawfulness in the provision of service does not occur, the Commission has the power, among other things, to summarily reject a tariff which is patently in conflict with the Act, a Commission regulation, policy or order. E.g., Associated Press v. FCC, 448 F.2d 1095, 1103 (D.C. Cir. 1971); AT&T - WATS, 46 F.C.C. 2d 13, 14 (1974). See also, American Tel. & Tel. Co. v. FCC, 487 F.2d 865, 880, n.33 (2d Cir. 1973).

Section 61.69(c) of the Commission's regulations provides that a carrier's failure "to comply with any provision"

of Part 61 of the Rules "will be grounds for rejection of the tariff material being submitted for filing." 47 C.F.R. §61.69(c). In the proceedings below, CBEMA argued that AT&T had failed to comply with Section 61.38 of the Commission's Rules, which requires that carriers submit certain detailed explanatory information at the time of filing tariffs. Because of AT&T's failure, and since that failure precluded resolving serious questions of unlawful cross-subsidy, CBEMA requested, among other forms of relief, rejection of the AT&T tariff. There is no question here that non-compliance with Section 61.38 of the Commission's Rules is a proper ground for rejection. Rather, the question is whether the Commission correctly refused to reject the AT&T Dataspeed 40/4 tariff on that basis below. For the reasons which follow, CBEMA submits that the Commission's action in that regard was a clear abuse of discretion.

A. Section 61.38 Requires The Submission
Of Adequate Data To Assure The Public
And The Commission That Proposed Rates
For Competitive Services Are Not Cross-
Subsidized By Monopoly Service Revenues.

Confronted by increasingly numerous and complex tariff filings, the Commission, on its own motion, undertook a general revision of its tariff review processes in 1969.^{11/} Rules were

^{11/} Tariffs-Evidence, supra, Notice of Proposed Rulemaking (FCC 69-1140, released October 17, 1969) (hereinafter cited "Notice"). To the extent the Notice was not reprinted in the official FCC Reports, a copy is included in the Appendix hereto (A-15).

proposed which, among other things, would lengthen to 60 days the period of advance notice to the public of new rates and services, would require a additional notification to affected customers of rate increases or service discontinuances, and would require additional information from carriers to explain and support tariff filings. Insofar as the need for detailed explanatory materials was concerned, the Commission emphasized the intent of the new Section 61.38 to be --

. . . making more explicit the types of information we feel are necessary for the Commission to effectively evaluate a rate and/or regulation change or new tariff offering. These rules will require the carrier to consolidate and present at the time of filing the tariff matter, the relevant data that the carrier has used in determining whether to make such change or new offering. 12/

After receiving comments from many parties, representing both carrier and customer interests, the Commission adopted its new tariff regulations substantially as proposed. The purpose of the Rules as a whole, the Commission made clear, was

12/ Id. at ¶5 (emphasis added) (A-16). See also, American Tel. & Tel. Co. v. FCC, 503 F.2d 612 (2d Cir. 1974), Brief for Respondents at 21-22:

Under the scheme prior to the Commission's rulemaking the public, because of lack of actual notice, lack of underlying data, or lack of time to adequately digest the data, was sometimes being denied effective participation in the Commission processes. This resulted in the Commission being denied an invaluable source of assistance.

"to elicit information and data which will facilitate the Commission's judgment as to whether such proposed tariffs present questions of lawfulness which warrant our investigation and hearing." Tariffs-Evidence, supra, 40 F.C.C. 2d at 153.

Each of the major component elements in the new scheme was consistent with that purpose. The extended public notice period permitted the public and the Commission a more realistic time period within which to evaluate tariff filings.^{13/} And Section 61.38 required the submission of sufficient explanatory detail and justification to assure that the opportunity for tariff review was not simply a superficial exercise. Aside from an explanation of, and the reasons for, a tariff filing, the Rule required carriers to set forth "the basis for ratemaking employed." A 12-month cost of service study and a 3-year projection of costs, traffic and revenues -- together with "complete explanations of the bases for the estimates" -- was demanded. Carrier work papers, which "contain the information underlying the data," were also required both for the Commission and for the public, together with a "clear indication . . . as to how the working papers relate to [the] information supplied."

^{13/} See, e.g., Tariffs-Evidence, supra, 25 F.C.C. 2d at 971-72. See also, American Tel. & Tel. Co. v. FCC, supra, 503 F.2d at 615-16:

By increasing the notice period from 30 days to 60 days, the Commission is providing more time for the public to file objections to, and for itself to evaluate, new tariffs.

Responding to carrier criticisms relating to the required disclosures, the Commission made clear that any burdens Section 61.38 might represent for the carriers were not unreasonable, particularly in light of the ultimate regulatory purposes which would be served:

Certainly, it is reasonable to assume that in the formulation of new or revised rates, which are to meet the statutory test of justness, carriers would be concerned with the revenue-cost relationships that may be expected to obtain under such rates. Responsible management decisionmaking would dictate the preparation of cost and traffic data of the character called for by the proposed rule. Hence, we do not regard it as either unreasonable or unduly burdensome to require the submission of such information by a filing carrier. In any event, we regard the information with respect to revenue-cost relationships as basic to the formulation of the essential regulatory judgments we must make with respect to the lawfulness under the Communications Act of new or revised rates tendered by common carriers.

Tariffs-Evidence, supra, 25 F.C.C. 2d at 965 (emphasis added).

On reconsideration, the Commission emphasized the importance of Section 61.38 in evaluating cost justifications for proposed rates, particularly where issues of cross-subsidy were involved:

Our own recent experience under these rules, has been that the submission by carriers of the required cost and other data to support competitive tariff filings has been helpful to us in determining the most orderly and effective regulatory steps to be taken and procedures to be followed in administering the Communications Act and implementing our policy

and objective thereunder of maintaining such competition on a full and fair basis We have found that it is particularly important to obtain the data required by our rules where questions are raised as to whether a new or reduced rate competitive service is being cross-subsidized by other services and whether there is factual support for allegations of anticompetitive impact from such rates. Thus, the value of our rules as a regulatory tool in the public interest far outweigh any supposed detriment to the private interests of carriers who desire to keep such data from their competition.

Tariffs-Evidence, supra, 40 F.C.C. 2d at 153 (emphasis added).

In the years since adoption of Section 61.38, the Commission has made plain that it sees its statutory ratemaking responsibilities vitally to include critical assessment of cost components for proposed rates.^{14/} And it has made equally clear that Section 61.38 is illustrative of regulations established "to facilitate determination of the justness and reasonableness of carrier rates."^{15/} During recent years, a working standard for the qualitative content of materials submitted under the Rule

^{14/} AT&T-Telpak, 61 F.C.C. 2d 587, 609:

We emphasize that ascertaining relevant costs is essential to our primary ratemaking responsibilities under the Act -- the determination of whether rates are just, reasonable and not unduly discriminatory. Likewise, knowledge of the cost of service permits identification of interservice burdens and cross-subsidization. An understanding of relevant costs is directly related to carrier accountability for the rates, charges, rules and practices contained in its published tariffs.

^{15/} Id. at 610.

has evolved. In the normal circumstance, a rate increase or a rate for a new service must be supported by sufficient data to allow a testing of cost and revenue results on which proposed rates are based. That standard -- enough information to test cost and market estimates, not simply review them -- reflects a practical requirement necessary to the fulfillment of the Commission's statutory duty to assure just, reasonable and non-discriminatory rates. And that standard is confirmed by a variety of recent rulings by both the Common Carrier Bureau and the Commission itself.

Pursuant to the Commission's internal delegations of authority, the Common Carrier Bureau bears the responsibility for passing on requests for rejection of tariffs in the first instance. 47 C.F.R. §0.291. In exercising that authority, the Bureau has rejected tariffs for competitive services where insufficiently detailed Section 61.38 data has been submitted. For example, where Section 61.38 material was insufficient for the Bureau "to assess and evaluate the allegations made by the petitioners opposing the subject rates," a competitive rate decrease by a United States international record carrier was rejected.^{16/} While summary information and projections had been

^{16/} Letter from Walter R. Hinchman, Chief, Common Carrier Bureau FCC, to John O'Boyle, Manager, Rates and Tariffs, ITT World Communications, Inc., May 30, 1975 (A-22).

submitted, the Bureau held that the absence of sufficient explanation, supporting data and work papers rendered meaningful rate evaluations impossible. See also MCI Telecommunications Corp., Mimeo No. 47264, released March 7, 1975 (Common Carrier Bureau).

In recent major rate cases, the Commission itself has clearly indicated that Section 61.38 material must contain enough data to test the carrier's cost and revenue estimates against allegations of cross-subsidy. In the AT&T-Hi-Lo decisions,^{17/} for example, the Commission rejected rates for certain proposed AT&T private line services because the supporting data, including computer models and studies submitted pursuant to Section 61.38, were inadequate to sustain the specific rates proposed.^{18/} Later in 1976, the Commission rejected another AT&T

^{17/} AT&T-Hi-Lo, 55 F.C.C. 2d 224 (1975); 58 F.C.C. 2d 362 (1976). The AT&T High Density-Low Density tariffs for voice grade private line service were a competitive response to specialized common carriers. AT&T proposed lower rates on the populous major city routes where competitors were active and higher rates on less populous routes where the risk of competition was much lower.

^{18/} Specifically, the Commission found the market study and computer model developed by AT&T for its 3-year revenue and cost projection grossly divergent from actual experience under the Hi-Lo rates. The market study projected a decline in business due to competition from specialized common carriers in the range of \$75-80 million for 1974, whereas the total revenue of all specialized carriers in that year reached only \$7 million. 55 F.C.C. 2d at 232. Other parts of the study predicted customer behavior of changing communications services without explanation or support for the assumptions made.

tariff, ruling it to be "unjustified and unlawful because serious questions exist regarding the validity of the embedded and incremental cost justification." AT&T-WATS, 59 F.C.C. 2d 671, 672 (1976).^{19/} The Commission held that cost must be the primary determinant of rates, and the cost and revenue studies submitted under Section 61.38, upon which the rates depended, were insufficiently explained and documented to allow testing of their results. In any refiling of the particular tariff rates involved, the Commission ordered, "material which must be filed pursuant to Section 61.38 of our Rules should be developed, and supplemented where appropriate," in accord with specific guidelines which the Commission set forth. Id. at 705-08.

Following these and other cases which dramatized the failure of AT&T tariff materials to support the rates proposed, the Commission prescribed a cost methodology to be used in future filings in the major AT&T rate structure case of 1976, Docket No. 18128.^{20/} The Commission's decision in that proceeding prescribed a fully distributed cost methodology which required

^{18/} cont'd In considering the AT&T cost studies, the Commission also found instance after instance of unexplained, unsupported and unreviewable factors, thus undermining the results of the studies submitted to support the rates. Id. at 233, 235-41.

^{19/} Among the items set for hearing with the WATS tariff was its compliance with Part 61 of the Commission's Rules, including Section 61.38. AT&T-WATS (Designation Order), 46 F.C.C. 2d 81, 84 (1974).

^{20/} AT&T-Telpak, 61 F.C.C. 2d 587 (1976).

accurate traffic and revenue forecasting methods, since the estimated demand for services and revenues expected are the bases for much of the construction and investment undertaken by the carriers.^{21/} The Commission also emphasized the accurate assignment of facilities costs to services which caused their creation, and which use the facilities at the time rates are fixed.^{22/} Underlying the prescription was the need for a clearly understood process of documenting rate filings so that the Commission could adequately test and review the materials submitted by the Carriers.^{23/}

In applying Section 61.38, therefore, the Commission has demanded a threshold level of supporting data adequate to test proposed tariff rates.^{24/} The relief granted by the Commission

^{21/} Id. at 661-67.

^{22/} Id. at 589, 590-91, 659.

^{23/} Id. at 664-65, 610.

^{24/} See also, Public Broadcasting Service, 63 F.C.C. 2d 702 (1977) where the Commission, among other things, refused to deny a certificate application by the Western Union Telegraph Company on the grounds that proposed preferential rates to the Corporation for Public Broadcasting might have adverse effects on other ratepaying Western Union customers:

Rather than request any special showing, we are satisfied that the cost justification information Western Union will file pursuant to Section 61.38 of the Rules [will be] sufficient to determine whether Western Union's revenues will in fact exceed its anticipated incremental costs.

Id. at 724 (emphasis added).

in the face of challenges to the adequacy of Section 61.38 data, and the extent to which it has discussed asserted deficiencies, has varied.^{25/} But there are no reported cases where serious questions regarding the quality of Section 61.38 material have been simply dismissed without some remedial action. Until the proceeding below.

B. The Supporting Information Filed By
AT&T With The Commission Failed To
Satisfy The Qualitative Standards
Of Section 61.38 Of The Rules.

Applying the qualitative Section 61.38 standards which the Commission has employed heretofore, it is plainly evident that the information submitted by AT&T did not meet the requirements of the Rule in at least three critical respects: (a) it did not disclose or allocate any preservice costs for the Data-speed 40/4; (b) it did not disclose or explain the cost

^{25/} In some cases, for example, the Commission has accepted Section 61.38 material without detailed analysis of its contents, because the filing on its face raised policy issues which required a hearing. E.g., American Television Relay, Inc., 37 F.C.C. 2d 751 (1972); United Video, Inc., 55 F.C.C. 2d 203 (1975). In other cases, the Commission accepted Section 61.38 material over protests because the rates would be consolidated into an ongoing hearing where they would be examined in depth. E.g., AT&T-Telpak (Docket No. 18128), 33 F.C.C. 2d 522 (1972); AT&T-Interstate Telephone Service (Docket No. 19129), 42 F.C.C. 2d 293 (1973). In such cases, however, the Commission did not abandon its pursuit for a qualitative showing of support for the tariff; the forum merely shifted to an evidentiary hearing.

methodology that was used; and (c) it did not support the conclusory marketing estimates which were given to justify the volume of sales and the revenues expected. Each of these factors is an important item in the rates for a new service, and the absence of supporting documentation for any of them substantially undermines any rates proposed. Moreover, each of these factors has a direct bearing on the question whether the Dataspeed 40/4 rates are cross-subsidized by monopoly service revenues.

First, as it was found in the Administrative Law Judge's Initial Decision in American Tel. & Tel. Co. - Dataphone Digital Service, 62 F.C.C. 2d 815 (1976), preservice costs for a new product or service usually represent substantial sums which can and should be attributed to the service.^{26/} Yet the AT&T material below contained no accounting of costs prior to the time that manufactured Dataspeed 40/4 units are ready for

^{26/} Id. at 836-37, and notes 45-50. The Initial Decision commented, "Despite the fact that Bell has been researching and developing DUV since the late 1960's and early 1970's, AT&T included no separate research and development expense for the research and development expenses attributable to the development of DDS." Id. at 836. The \$23 million estimated by the Trial Staff for research and development expenses was almost half of the \$46 million that AT&T claimed for total forecasted expenses. Id. at 835. The Commission's Final Decision made no finding as to the amount of "R&D and start-up costs for DDS." It noted, however, "record evidence that AT&T did not fully account for all relevant R&D expenditures in relation to DDS." 62 F.C.C. 2d 774, 788 (1977).

delivery to telephone companies.^{27/} And nowhere in the cost material were expenses tabulated for prototype design, prototype manufacture, prototype testing, further development and other necessary steps before mass production. AT&T never stated that design, research, development, testing, and other preservice costs were not incurred. In fact, in its pleadings to this Court, AT&T has made clear that the Dataspeed 40/4 was the result of a "major, long term research and development program."^{28/}

The methodology by which a carrier's various cost factors are transformed into revenue requirements, upon which the rates are based, is no less important than an accurate accounting of particular cost elements. Cost methodology determines, for example, how much of common or overhead costs a

^{27/} In the portion of its Section 61.38 data titled "Description of Cost Studies and Results" AT&T explained its cost calculations as comprising two elements, investment costs and annual costs. (J.A. 267.) Investment costs included the price of material used in manufacturing, Western Electric distributing house labor in "assembling, wiring, and testing Dataspeed 40 equipment prior to delivery," an allowance for field stock being repaired, installation costs and costs in shipping, storage and the like. (J.A. 267-72.) Annual costs were computed from estimated expenses such as depreciation, taxes, maintenance and test equipment plus an amount for return on investment (12%) and reserve requirements. (J.A. 272-81.)

^{28/} AT&T, Opposition to Motion for Stay at 6 (emphasis added). Previously, AT&T acknowledged research, development and other preservice costs, but claimed that these expenditures were totally separate from any monopoly service activities. AT&T Application for Review at 19, note * (J.A. 673). The Commission, of course, never addressed the AT&T claim.

particular service will bear.^{29/} AT&T's supporting materials below, however, failed to specify which cost methodology had been used for the new competitive service. Rather, AT&T merely categorized the costs in general terms and concluded on the basis of its marketing studies that those costs would be covered by the revenues returned.^{30/} Without a known cost methodology, it is virtually impossible to judge whether the costs and categories are appropriate and fully reflect all relevant expenses.

Finally, the marketing estimates contained in AT&T's Section 61.38 material did not even approximate the standards normally required by the Commission. In its "Description of Basis of Market and Revenue Estimates" (J.A. 258.), for example, AT&T relied on a "review" of two published market studies for

^{29/} In extreme cases, the Commission has found, the use of a popular AT&T cost methodology for terminal equipment has resulted in a failure to assign virtually any overhead costs which terminal equipment rates must cover. The Commission's First Report in Docket No. 20003, for example, faulted AT&T cost and revenue studies for terminal equipment for failing to allocate overhead costs to terminal equipment. The Report further cited investigations of the New York, Vermont, and Connecticut public utility commission which confirmed a failure to allocate a proper share of overhead and other costs to terminal equipment. In the Matter of Economic Implications of Customer Interconnection, 61 F.C.C. 2d 766, 827-28, 848-53, 855-57 (1976).

^{30/} As the "Basis of Ratemaking Employed," AT&T reported only that, "In selecting rates for the items of equipment filed herein, AT&T took into account market considerations as well as the costs of the items filed." (J.A. 250.) References were made to certain specific incremental costs (J.A. 279), but it was not apparent whether an incremental methodology was the basis for the entire rate calculation.

its own estimates of the size of the CRT type terminal market, the cluster terminal portion of that market, and customer preferences for features. Based on those estimates and "its knowledge and experience in the market," AT&T reached "informed judgments" of the likely success of the Dataspeed 40/4 at four test rates, and selected a rate 10% below its calculation of the industry leader's price. (J.A. 258-59.) The Commission was asked to accept these bare bones marketing estimates, notwithstanding serious deficiencies in earlier AT&T marketing studies. ^{31/}

In summary, the Section 61.38 supporting material filed with the Dataspeed 40/4 tariff failed to account for three major areas of information which the Commission has found to be critical to supporting rates. The omissions of information were neither trivial nor easily remedied by information in the possession of the Commission or other parties. In view of these omissions, the AT&T material failed to show "all relevant costs," "the basis of ratemaking employed" and the supporting data to justify its rates as required by Section 61.38. The Commission's conclusion that Section 61.38 had been satisfied was clearly in error, and should be reversed.

^{31/} The Hi-Lo marketing estimates predicted a loss of business to competing carriers in one year in the range of \$75-80 million, while the competing carriers totaled only \$7 million for the same year. 55 F.C.C. 2d at 232. In the Dataphone Digital Service case, AT&T estimated revenues in the first year of \$129 million, while its actual revenues were only \$1,759,000. The Initial Decision held that the estimates were not in the ballpark with actual revenues, nor "even in the same league." 62 F.C.C. 2d 815, 832 n. 33.

II. The Commission's Failure to State The Reasons For Its Rulings With Respect To Section 61.38 Of Its Rules, And Its Refusal To Address The Substantial Issue Of Cross-Subsidy Raised By CBEMA, Were Arbitrary And Capricious.

A fundamental requirement of administrative decision-making is that the agency clearly state the reasons for its actions. Be it adjudication or rulemaking, there is a basic legal obligation adequately to articulate why a particular result has been reached. In part, the requirement is for the litigants themselves. As reflected in 5 U.S.C. §555(e), for example, a disappointed petitioner is entitled to know why his request for relief has been denied. E.g., Community Service, Inc. v. United States, 418 F.2d 709, 717 (6th Cir. 1969); Air Line Pilots Ass'n Int'l. v. CAB, 458 F.2d 846 (D.C. Cir. 1972). In part, the obligation is to permit adequate judicial review. As Judge Wright observed in West Michigan Telecasters v. FCC, 396 F.2d 688, 691 (D.C. Cir. 1968):

[I]n order for a court to exercise in any meaningful way its function of review, it is necessary that the Commission state specifically the basis for each of its conclusions.^{32/}

In its decision below, the Commission failed completely to satisfy its obligation in either regard.

^{32/} See also, e.g., Columbia Broadcasting System v. FCC, 454 F.2d 1018, 1025 (D.C. Cir. 1971):

Much of our evolving body of administrative procedure rests upon the conservative requirement of reasoned decision making. Without such a requirement, effective judicial review would be impractical if not impossible . . .

A. The Commission Failed Adequately To
Explain Why It Viewed AT&T's Submissions
To Have Satisfied Section 61.38, Or To
Give Reasons For Not Considering CBEMA's
Alternative Requests For Relief

Although it had argued the matter for more than a year, CBEMA was unable to obtain from the Commission a reasoned explanation concerning either the scope and quality of Section 61.38's requirements, or the manner in which the Commission deemed AT&T to have satisfied the Rule's requirement below. As described earlier, ^{33/} prior to the Common Carrier Bureau's March 1976 ruling, CBEMA had argued extensively that the materials submitted by AT&T when the Dataspeed 40/4 tariff was filed satisfied neither the literal terms, nor the basic intentions, of Section 61.38. As CBEMA pointed out at the time, there had been no accounting for a variety of preservice costs (including research and development, testing, marketing, warranties, overhead and tariffing), no explanation of either the costing methodology chosen or the manner of its use in rate development, and no justification of the cursory marketing estimates offered. (J.A. 698-700.) CBEMA contended that the absence of such information, as well as the lack of AT&T's relevant work papers, failed to satisfy the specific directives of Section 61.38. (J.A. 911-12.)

In addition, CBEMA argued, AT&T's violation of the Rule was not merely an inconsequential technical failing, for the lack of such data rendered impossible informed judgments on the

^{33/} See pages 11-12, supra.

vital issue of cross-subsidy. It was just such circumstances, CBEMA pointed out, that the Commission stated its intention to avoid in adopting Section 61.38:

We have found that it is particularly important to obtain the data required by our rules where questions are raised as to whether a new or reduced rate competitive service is being cross-subsidized by other services and whether there is factual support for allegations of anticompetitive impact from such rates.

Tariffs-Evidence, supra, 40 F.C.C.2d at 153. (J.A. 912.)

The Common Carrier Bureau obviously agreed that the supporting materials initially submitted with the AT&T tariffs did not satisfy what it viewed to be the requirements of Section 61.38. In January, 1976, the Bureau Chief, specifically noting CBEMA's arguments, directed an extension of the effective date of AT&T's tariff and requested additional information. (J.A. 624-25.) CBEMA was not privileged to see all of those additional materials. ^{34/} Yet even the Bureau, which considered at least a few of them, concluded that "the costs associated with [the Data-speed 40's] design, development and manufacture, as submitted with this tariff filing, are not clearly separable from monopoly and other regulated common carrier activities." (J.A. 650; emphasis added.) Moreover, the Bureau concluded further that "the material submitted does not permit us to determine whether its costs are subsidized." (Ibid; emphasis added.)

^{34/} Compare A-13, 14 with Section 61.38(b)'s directive that "working papers . . . shall be available for use by the public."

its costs are subsidized." (Ibid; emphasis added.)

Surprisingly, however, elsewhere in its decision the Bureau also stated -- without discussion -- that AT&T had satisfied Section 61.38. The entirety of the Bureau's statement on the point was as follows: (J.A. 650.):

Finally, CBEMA contends that the cost justification submitted is insufficient and violates Section 61.38 of the Rules. Since AT&T has submitted additional material at our request to support statements made in its original filing, we consider the material not violative of Part 61 of our Rules.

On appeal to the Commission, CBEMA argued that the latter Bureau conclusion was fundamentally inconsistent with the Bureau's other statements concerning its inability to determine from the AT&T information submitted whether in fact the proposed Dataspeed 40/4 rates were cross-subsidized by monopoly service revenues. As CBEMA put it at one point (J.A. 701):

If the cost material submitted by AT&T is not sufficient to judge cross-subsidy of competitive services by monopoly service revenues, then a fortiori the Rules designed to elicit this information have not been satisfied.

CBEMA contended that the Bureau's summary statement concerning AT&T's compliance with Section 61.38 did not satisfy the requirement for reasoned decisionmaking under the Administrative Procedure Act. (J.A. 702.) And CBEMA also emphasized that the basic cross-subsidy questions it had raised -- and hence the fundamental issue

of compliance with Section 61.38 -- remained for resolution even if the Commission were to determine the Dataspeed 40/4 to be a communications offering. (J.A. 704.) For its part, AT&T vigorously disputed CBEMA's position. (J.A. 728.)

In the decision below, the Commission noted CBEMA's challenge to the Bureau's statement with respect to Section 61.38 (J.A. 983), and purported to dispose of the entire matter in one cursory paragraph (Ibid):

Even assuming any inconsistencies existed in the Bureau Chief's order, they are now rendered moot by our reversal. The concerns which CBEMA raises in its petition address problems which are beyond the scope of Section 61.38. The Bureau Chief concluded that the tariff revision and the supporting material submitted with it was sufficient on its face to withstand rejection on the basis of Section 61.38. We have reviewed the supporting material and agree with the Bureau Chief that no prima facie showing of unlawfulness has been made which would merit rejection. AT&T has substantially complied with the requirements of Section 61.38 and has clearly complied with the specific components thereof in terms of the economic data submitted, justification for the filing, and the basis for the rates selected. Section 61.38 has been applied to the Dataspeed 40/4 offering in a manner consistent with previous Commission determinations. We shall deny CBEMA's petition. Accordingly, no basis for rejection exists.

Neither in its entirety, nor in its component parts, does the Commission's treatment represent a reasoned disposition of the matters which had been presented to it for decision.

First, the Commission's conclusion that the "inconsistencies" in the Bureau's ruling which CBEMA had pointed out were "rendered moot by [the Commission's] reversal" is an enigma, at best. CBEMA had argued that, whether or not the Dataspeed 40 was deemed to be a communications offering, a finding of insufficient data to determine the existence of cross-subsidy was mutually exclusive with a conclusion that Section 61.38 had been satisfied. (J.A. 701.) Thus, simply ruling that the Dataspeed 40/4 was a communications offering did not "moot" the "inconsistencies" relating to Section 61.38 in the Bureau's decision. But most importantly, if the Commission believed that it did, there was at least a requirement that some rational basis for that belief be articulated.

Second, the Commission's dismissal of CBEMA's "concerns" as addressing "problems which are beyond the scope of Section 61.38" is wholly unfathomable. Which "concerns"? The absence of a statement of agency reasons why CBEMA's position on the requirements of Section 61.38 was deemed to be in error? The absence of "underlying data" specifically called for by Section 61.38? The substantial indication of cross-subsidy evident from the partial Section 61.38 information submitted? If the Commission believed that all such "problems" were "beyond the scope of Section 61.38" -- a statement which, taken literally,

is patently indefensible -- CBEMA and this Court are certainly entitled to know why.

Third, the Commission's summary conclusion of AT&T's compliance with Section 61.38 was wholly inadequate. In this regard, it should be recalled that the Bureau had not viewed the information initially submitted by AT&T to satisfy Section 61.38. Rather, the Bureau ruled that Section 61.38 had been satisfied "[s]ince AT&T has submitted additional material at our request." (J.A. 650.) While the decision below stated that the Commission had "reviewed" the "supporting material" (J.A. 983), the fact is that it considered none of the materials submitted by AT&T in response to the Bureau's request. (A-13-4 .) To that extent, the Commission must have been relying on, if anything, only a "review" of the materials initially submitted by AT&T. But since the Bureau had not viewed those materials adequate to meet Section 61.38, the Commission's statement that it "agree[d] with the Bureau Chief" on the adequacy of that information, if defensible at all, at least required further explanation.

Finally, while the Commission summarily asserted its conclusion that AT&T had "substantially complied" with Section 61.38's "specified components", and that the Rule was being applied "in a manner consistent with previous Commission determinations", the Commission's rationale for these conclusions is entirely unclear. With which "previous Commission determinations" the

Commission viewed its action to be "consistent" , of course, was nowhere stated. Not even citations were provided in the decision. Certainly the conclusion was not "consistent" with such "previous Commission determinations" as those made in adopting Section 61.38, ^{35/} or those reached in subsequent proceedings where the absence of showings relating to cross-subsidy was held violative of the Rule. ^{36/}

Moreover, with regard to "substantial compliance" with Section 61.38, what of CBEMA's contention that information concerning such preservice cost factors as research, development, design and testing expenses was missing? Was it the Commission's view that the Rule did not require that data? Or that, if required, its absence below was not consequential? Or that, if consequential, the infirmity represented by its absence was outweighed by other factors? None of these matters -- vital to any valid public interest judgment -- were addressed or explained by the Commission.

In addition to failing adequately to explain its interpretation and application of Section 61.38, the Commission also ignored entirely CBEMA's alternative requests for relief below. Here, too, the matter was one which had been raised by CBEMA from the very outset of the proceedings. When CBEMA filed its initial objections to the Dataspeed 40/4 tariff, it requested alternative forms of relief. In light of AT&T's clear failure to satisfy Section 61.38, CBEMA urged rejection of the tariffs as the most

^{35/} See pages 20-24, supra.

^{36/} See pages 24-29, supra.

appropriate agency and (J.A. 410.) If rejection were not deemed to be required, MA argued, then the Commission should, pursuant to Section 203(b) of the Act, 47 U.S.C. §203(b), extend the tariff notice period for 120 days, and direct the submission of the needed information in 60 days. (J.A. 411-12.) CBEMA contended that such an approach would "enable interested parties to review and understand the nature of the tariff proposal and to submit such documents as they believe appropriate in the circumstances." (J.A. 411.) Finally, if the Commission were not favorably inclined to either rejection or an extension of the notice period, suspension and investigation of the tariff was a clearly indicated requirement. (J.A. 412.)

On appeal to the Commission, CBEMA repeated its alternative requests for relief. It argued that the Bureau's ruling against rejection on Section 61.38 grounds was in error. (J.A. 697.) And it urged again that even if the Bureau's position in that regard were upheld, both the inadequacy of the Section 61.38 materials and the unresolved issue of cross-subsidy required at least suspension of the tariff and further pursuit of the matter. (J.A. 704.)

In the decision below, the Commission acknowledged CBEMA's requests for "rejection or suspension", and recognized the Bureau's ruling on Section 61.38 to have been "silent" on the appropriateness of any relief other than rejection. (J.A. 974.) Without any explanation, however, the Commission preserved

that "silence". For while it endorsed the Bureau's ruling "that no prima facie showing of unlawfulness has been made which would merit rejection," and held that "no basis for rejection exists" (J.A. 983), the Commission failed to address the appropriateness of any of CBEMA's alternative requests for relief. And there is no indication why the decision was silent in that important respect. If the Commission's view was that CBEMA's arguments relating to Section 61.38 were pertinent only to rejection requests, it should have said so. Or if the Section 61.38 contentions were pertinent to CBEMA's requests for alternative relief, but the Commission was unpersuaded to grant them, it should have made that clear. But it did neither. And the court is left only to speculate as to the Commission's views -- a circumstance uniformly held to be repugnant to effective judicial review. See, e.g., Northeast Airlines, Inc. v. CAB, 331 F.2d 579, 586 (1st Cir. 1964).

In all, therefore, the Commission's failure adequately to have articulated the basic rationale for its actions concerning Section 61.38 and CBEMA's requests for relief preclude meaningful review at this juncture. As the Supreme Court has observed in words particularly apt here, the Commission's decision below does not express its basis or reasons --

. . . with the simplicity or clearness through which a faltering impression ripens into a reasonable certitude. In the end we are left to explain how, to argue, to judge between conflicting inferences. Something more precise is requisite in the quasi-judicial findings of an administrative agency. . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong.

United States v. Chicago, M., St. P. & P. Ry, 294 U.S. 499, 510-11 (1935).

B. The Commission's Refusal To Address
The Material And Substantial Issue
Of Cross-Subsidy Was A Clear Abuse
Of Discretion

As indicated earlier,^{37/} the Commission has established and maintained a firm policy against monopoly carriers' cross-subsidizing competitive communications services. From the time of its initial filings with the Commission below, CBEMA posed serious and substantial questions concerning an apparent cross-subsidizing of the proposed Dataspeed 40/4 rates from AT&T monopoly service revenues. Yet the Commission's decision below ignored all such matters. In the words of the Court in West Michigan Telecasters, Inc. v. FCC, 396 F.2d 688, 691 (D.C. Cir. 1968):

^{37/} See pages 26-29, supra.

The Commission's memorandum is merely a collection of conclusory comments; it may be concise, but it certainly does not dispose of the issues raised by [CBEMA's] pleadings.

From the time of its first filings below, CBEMA cited the Commission's policies against cross-subsidies among communications services -- policies based in substantial part on the resultant discriminatory burden imposed on the monopoly services contributing revenue for the subsidized competitive activities. (J.A. 407-08.) And CBEMA explained in detail how the information which had been submitted by AT&T in support of its Dataspeed 40/4 rates was insufficient to conclude that those policies were not being violated. (J.A. 611-16.)

Prior to the Common Carrier Bureau's ruling, CBEMA outlined in detail the normal preservice costs for a new product of the Bell System, because preservice research, development, testing, manufacturing and tariffing almost surely involve Bell Telephone Laboratories, Western Electric Company, and AT&T Long Lines Department, each of which is substantially funded by monopoly service revenues. (J.A. 605-07.)^{38/} CBEMA called for

^{38/} Bell Telephone Laboratories, for example, is normally the chief source of research and development efforts by the Bell System, and the bulk of the Laboratories' funding comes from AT&T's Fundamental Research and Development fund and Western Electric's Specific Design and Development fund. (J.A. 606.) The AT&T fund comes from license fees paid by affiliated local telephone companies, and the Western

(continued next page)

an accounting of the roles of these entities with respect to the Dataspeed 40/4, their costs and the funding for their efforts. (J.A. 610.) Eleven specific questions were framed by CBEMA to elicit the required information from AT&T, and the Bureau was urged to obtain answers to those questions. (J.A. 614-15.)

For its part, AT&T declined to discuss any of the inadequacies in research and development costs and revenue or marketing estimates asserted by CBEMA. The carrier stated simply (J.A. 472-73):

The material filed by AT&T in support of its filing is substantially similar to materials filed in support of previous tariff submissions which have been held in full compliance with the requirements of Section 61.38. The materials submitted by AT&T on November 18, 1975, to support the tariff provisions offer an extensive statement in explanation of the DATASPEED 40 features being offered, the reasons for the filing and the basis of ratemaking employed, together with extensive supporting market and cost data.

The Chief of the Common Carrier Bureau basically agreed with CBEMA's position. For, as noted above, he specifically found that "the costs associated with [the Dataspeed 40/4's] design, development and manufacture . . . are not clearly

38/ (continued)

Electric fund is derived from profits on equipment sold to local Bell companies, the vast majority for monopoly telephone service. (Ibid.) See also, AT&T - Interstate Telephone Service, (Initial Decision, FCC 76D-41, August 2, 1976) at para. 14-16.

separable from monopoly and other regulated common carrier activities," and that he could not "determine whether [the Dataspeed 40/4's] development costs are subsidized." (J.A. 650.)

The issue of cross-subsidy was the subject of further, and more intense, contention in the appeals to the Commission from the Bureau's decision. Terming the "cross-subsidy issue" to be "spurious," AT&T's pleading asserted -- for the first time -- that the "Dataspeed 40 is manufactured by the Teletype Corporation, a completely separate subsidiary and all the costs associated with the 'design, development and manufacture' are completely segregated from any monopoly or other regulated common carrier activities of the Bell System." (J.A. 673.)^{39/} AT&T also argued that cross-subsidy in the context of the Computer Inquiry policies was "totally distinct" in consequence from cross-subsidy between communications services. In the latter case, AT&T contended, "cross-subsidy questions only arise if it can be shown that the rates for a particular service will not recover the relevant costs allocated to that service." (J.A. 731-32.) Predictably, AT&T argued that CBEMA had made no such showing. (J.A. 734.)

^{39/} See, however, AT&T - Interstate Telephone Service, supra, at para. 32:

Western Electric has been the Bell System's manufacturing and supply unit since 1882; it is wholly owned by AT&T Teletype Corporation . . . [is] a wholly-owned subsidiary of Western Electric

CBEMA challenged AT&T's assertion that the "relevant" costs of service had been shown, when no design, development or pre-service costs had been accounted for in the Dataspeed 40/4 supporting material. (J.A. 912.) In support of its position, CBEMA submitted a decision by the Massachusetts Department of Public Utilities which found that substantial pre-service costs for the "Dimension PBX" (a new computerized business device) were spread over a product line that included ordinary telephones. (J.A. 916, 919.)^{40/} If this practice were followed concerning the Dataspeed 40/4, and no evidence demonstrated to the contrary, the preservice costs for the Dataspeed 40/4 would be spread over a product line that included older Bell System products which no longer incurred start-up costs. (J.A. 917.) Cross-subsidy in that case, CBEMA argued, would be undeniable.

^{40/} The Massachusetts opinion explained the significance of the Bell System failure to allocate pre-service costs specifically to Dimension PBX (J.A. 943-44):

This treatment results in an inadequate allocation of the costs when such costs are the basis of pricing a competitive product. . . . The customer premise product-line to which this R&D is assigned consists largely of basic non-competitive telephone equipment which is located on the customer's premises, e.g., all basic residential telephone handsets. Thus, the residential ratepayer, for instance, is bearing the R&D associated with a sophisticated product such as Dimension PBX, even though there is no correlation between the character or capability of the equipment or the communications needs of the respective subscribers.

In terms of remedy, CBEMA endorsed the Bureau's rejection of the tariff on the grounds stated in its decision. However, CBEMA contended alternatively that, even if the Commission were to disagree with the Bureau's characterization of the Dataspeed 40/4 as a data processing offering, a complete resolution of the cross-subsidy issue would be essential prior to permitting any tariffs to become effective. (J.A. 704.) In response, AT&T argued strenuously that "CBEMA's arguments regarding possible cross-subsidies really go to the appropriateness of the rate levels established for the service and issues of this type cannot provide the basis for rejecting a tariff." But at the same time, AT&T conceded that if "the Commission . . . believes that there are significant disagreements relating to the substance of the [supporting AT&T] material . . . , or that there are questions regarding the lawfulness of the tariff rates or regulations then it may set the tariff for investigation and hearing." (J.A. 737.)^{41/}

In its decision below, the Commission took brief note both of CBEMA's contentions and of its alternative requests for

^{41/} See also, J.A. 738:

[I]f the Commission believes that CBEMA has raised matters that warrant further investigation the only course of action which would be consonant with the statutory plan of the Communications Act is to suspend the tariff, permit it to go into effect and institute an investigation and hearing on the tariff filing.

relief. (J.A. 974.) It also acknowledged AT&T's position that if the Dataspeed 40/4 were deemed a communications offering, investigation and/or suspension under Section 204 were appropriate "tools available to ensure that there is no cross-subsidy." (J.A. 975.) With a thundering non sequitur, however, the Commission then side-stepped the entire matter:

The concerns which CBEMA raises in its petition address problems which are beyond the scope of Section 61.38.

(J.A. 983.) The Commission never resolved whether any substantial cross-subsidy issue had been raised, whether any of the relief requested by CBEMA should be granted, or whether its "investigatory hearing and prescription tools" should be employed then or in the future with respect to the Dataspeed 40/4. In short, after having recognized the existence of a material argument, the Commission refused to resolve the competing claims, or to issue any ruling determining the merits of the controversy.

CBEMA submits that the absence of any meaningful disposition of the cross-subsidy issue was both an abdication of the Commission's substantive responsibilities under the Communications Act, and an ignoring of basic decisionmaking requirements. Under the Communications Act, the Commission is directly charged with the responsibility of "making available . . . adequate service at reasonable charges." 47 U.S.C. §151.

Regarding common carriers in particular, the Act lays down strict standards for just, reasonable and non-discriminatory charges and declares that any unjust, unreasonable or unduly discriminatory charges "shall be unlawful." 47 U.S.C. §§201, 202. The Commission is responsible for investigating carrier charges on its own motion or on complaint, and if carrier charges, practices or regulations are found unlawful or in violation of the Act, the Commission is empowered to prescribe the just, fair and reasonable charge or practice to be followed thereafter. 47 U.S.C. §§204, 205.

The courts have consistently made clear that unfair competition and marketplace restraints are important factors which, when raised, must be considered by regulatory agencies in their supervision of common carrier services. See, e.g., Federal Maritime Comm'n v. Svenska Amerika Linien, 390 U.S. 238, 244 (1968); Trailways of New England, Inc. v. CAB, 412 F.2d 926 (1st Cir. 1969).^{42/} And the relationship of such factors to the Commission's public-interest judgments has been noted in a variety of contexts. See, e.g., GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973); General Tel. Co. of the Southwest v. FCC, 449 F.2d 846 (5th Cir. 1971).

^{42/} Accord, Marine Space Enclosures Inc. v. Federal Maritime Comm'n, 420 F.2d 577 (D.C. Cir. 1969).

A principal focus of FCC efforts in recent years has been towards eliminating cross-subsidies, anticompetitive practices and predatory conduct that results in harm to the public interest. In Interstate and Foreign MTS and WATS, 56 F.C.C.2d 593 (1975), for example, the Commission removed restrictions placed by AT&T on non-carrier equipment used with the public telephone network. Further, the Commission required FCC registration of all terminal equipment, including carrier equipment, to assure maximum protection of the telephone network and to prevent carriers from resuming their practices of hindering competing equipment suppliers. Id. at 601. In the original Computer Inquiry, supra, in authorizing domestic communication carrier operations by satellite^{43/} and with use of new segments of the radio spectrum,^{44/} the Commission has taken steps to prevent cross-subsidies, unfair competition and anticompetitive practices.

Moreover, in its supervision of rates and tariffs, the Commission has exerted constant efforts to eliminate cross-

43/ In Domestic Communications Satellite Facilities, 34 F.C.C. 2d 9, 35 F.C.C.2d 844 (1972), the Commission placed restrictions on an AT&T satellite venture so that the carrier's use of its huge monopoly resources would not distort the market for other carriers.

44/ In Land Mobile Service in the 900 MHz Frequency Band, the Commission required wireline common carriers (telephone companies) to begin operations in this new, competitive field by means of separate subsidiary corporations. 51 F.C.C.2d 945, 951 (1975).

subsidies, to require properly supported tariffs and to prescribe studies and methods by which its goals can be met by the carriers. In the AT&T-Hi-Lo, and the AT&T (Dataphone Digital Service) proceedings, supra, the Commission set out in detail the kind of cost and market research required to assure that competitive services cover their fairly apportioned costs. And observing that its "prior decisions reflect that cross-subsidization is generally not in the public interest" (61 F.C.C. 2d 587, 608), the Commission in AT&T, set forth precise guidelines for future AT&T tariff filings, to assure both that common costs are fairly spread over all services and that the Commission's Staff can adequately track, test and evaluate the changes in costs and tariff filings.

In this case, however, the Commission failed entirely to even address the parties' contentions concerning cross-subsidy. There was no consideration of CBEMA's contention that the Bureau's findings and conclusions on cross-subsidy should be affirmed, irrespective of the ultimate classification of the Dataspeed 40/4 as either a communications or a data processing device. Similarly, the Commission's decision never discussed AT&T's contention that cross-subsidy under the Computer Inquiry raised issues distinct from those raised by cross-subsidy among communications services, or its challenge to the Bureau's cross-subsidy finding as "spurious."

CBEMA submits the Commission could not simply ignore the cross-subsidy questions raised below. If the Commission viewed the circumstances not to fall within its earlier holdings in that regard, it should have said so. And if it were departing from its earlier approach, it should have explained why. Marine Space Enclosures Inc. v. Federal Maritime Comm'n, supra. But it could not properly leave the record this court must review a blank. Cf. Meadville Master Antenna Inc. v. FCC, 443 F.2d 282 (3d Cir. 1971); Presque Isle TV Co. v. United States, 387 F.2d 502 (1st Cir. 1967); Community Service Inc. v. United States, 418 F.2d 709, 717 (6th Cir. 1969). See Community Broadcasting Co. v. FCC, 274 F.2d 753 (D.C. Cir. 1960); United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).^{45/} As the court stated in MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257, 1265 (D.C. Cir. 1968):

Issues brought to the Commission's attention may not be so cavalierly disregarded.

^{45/} Compare, Southwest Pennsylvania Cable TV, Inc. v. FCC, 514 F.2d 1343 (D.C. Cir. 1975); Consolidated Nine, Inc. v. FCC, 403 F.2d 585 (D.C. Cir. 1968); Community First Corp. v. FCC, 403 F.2d 578 (D.C. Cir. 1968). See also, Kodiak Airways, Inc. v. CAB, 447 F.2d 341 (D.C. Cir. 1971); Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970).

CONCLUSION

Accordingly, for the reasons set forth above, the Commission decision below should be set aside, and the matter remanded to the Commission for further appropriate action.

Respectfully submitted,

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COMMUNICATIONS ACT OF 1934, AS AMENDED

TITLE II--COMMON CARRIERS

SERVICE AND CHARGES

SEC. 201. (a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; and, in accordance with the order of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this Act may be classified into day, night, repeated, un-repeated, letter, commercial, press, Government and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the

exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this Act or in any other provisions of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provision of this Act.

DISCRIMINATION AND PREFERENCES

SEC. 202. (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of \$500 for each such offense and \$25 for each and every day of the continuance of such offense.

SCHEDULES OF CHARGES

SEC. 203. (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

"(b) (1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after ninety days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

"(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than ninety days."

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall pay to the United States the sum of \$500 for each such offense, and \$25 for each and every day of the continuance of such offense.

"SEC. 204. (a) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the

period of the suspension, the proposed new or revised charges, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or an increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or increased charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

"(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission,

upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a)..."

COMMISSION AUTHORIZED TO PRESCRIBE
JUST AND REASONABLE CHARGES

SEC. 205. (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of \$1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

FEDERAL COMMUNICATIONS COMMISSION
Rules and Regulations

§61.38 Material to be submitted with letter of transmittal by filing carriers.

(a) Explanation and data supporting changes and/or new tariff offering. The material to be submitted for a tariff change or for a tariff filing which is for a service not previously offered, shall include: (1) an explanation of the changed or new matter, the reasons for the filing, and the basis of ratemaking employed; and (2) economic data and information to support the changed or new matter including:

- (i) For changed matter, a cost of service study for all elements of costs for the most recent 12-month period; and for changed and new matter a study containing a projection of costs for a 3-year period beginning at the date of the filing of the tariff matter; and
- (ii) Estimates of the effects of the changed or new matter upon the carrier's traffic and revenues from the service to which the changed or new matter applies; upon the traffic and revenues from the other service classifications of the carrier; and upon the overall traffic and revenues of the carrier. Estimates should include the estimated effects on the traffic and revenue data for the most recent 12-month period and projections for a 3-year period beginning at the date of the filing of the changed or new matter. Complete explanations of the bases for the estimates should be provided.

(b) Working papers and statistical data. (1) There is to be furnished to the Chief, Common Carrier Bureau, upon filing of any tariff change or tariff filing which is for a service not previously offered, two sets of working papers for use by the

staff and two sets of working papers which shall be available for use by the public at the Commission's offices. These working papers shall contain the information underlying the data supplied in response to paragraph (a) of this section. A clear indication shall be made as to how the working papers relate to information supplied in response to paragraph (a) of this section.

(2) All statistical studies will be submitted and supported in the form prescribed in §1.363 of this chapter.

(c) Submission of explanation and data by connecting carriers. If the changed or new matter is being filed by the issuing carrier at the request of a connecting carrier, it will be the duty of the connecting carrier to provide the data and information in paragraphs (a) and (b) of this section on the date the tariff matter is filed with the Commission by the issuing carrier.

(d) Form and content of material submitted with certain rate increases. (1) For each rate increase in any service or tariffed item resulting in (i) a 10 percent or greater increase in annual revenues from that service or tariffed item, and (ii) at least \$100,000 in additional annual revenues, both calculated on the basis of existing quantities of service, or for two or more rate increases applying to the same service or tariffed item during any 12-consecutive-month period resulting in (a) a 10 percent or greater increase in annual revenues from that service or tariffed item, and (b) at least \$100,000 in additional annual revenues, both calculated on the basis of existing quantities of

service, the filing carrier shall submit all cost, marketing and other data on which it relies in justification of the rate increase and in an appropriate form to serve as the carrier's direct case in the event the rate increase is set for hearing initially scheduled to commence on a date within 6 months from the date of filing. If the rate increase is designated for hearing the carrier shall submit any additional information on which it relies in documentary form, within 45 days from the date of designation.

(2) The information and data requirement of subparagraph (1) of this paragraph shall be submitted for a rate increase in any service or tariffed item resulting in more than \$1 million in additional annual revenues, as calculated on the basis of existing quantities of service, without regard to the percentage increase in such revenues.

(3) The requirement imposed here is in addition to any requirement imposed by the other provisions of this section.

(e) Copies of explanation and data to customer. Concurrently with the filing of any rate for special construction or special assembly equipment and arrangements which were developed on the basis of estimated cost, the filing carrier shall transmit to the customer a copy of the explanation and data required by paragraphs (a) and (b) of this section.

(f) Exception. The requirements of this section shall not apply to any carrier with annual gross revenues of less than \$100,000.

Note 1: Carriers with annual gross revenues of less than \$1 million are exempt from the requirements of this section until January 30, 1971

Note 2: The requirements of this section will not apply until January 30, 1971, in those situations where a carrier is filing rates to equal lower rates set by a competing carrier.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COMPUTER AND BUSINESS EQUIPMENT	)	
MANUFACTURERS ASSOCIATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 77-4059
	)	
FEDERAL COMMUNICATIONS COMMISSION	)	
and THE UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	

STIPULATION IN LIEU OF FILING
CERTIFIED LIST OF ITEMS IN THE RECORD

Pursuant to Rule 17(b) of the Federal Rules of Appellate Procedure, the Petitioner and Respondent parties hereto stipulate as follows:

(1) Neither the record nor a certified list will be filed with the court; instead, the certified list filed in case nos. 77-4005 and 77-4020 is adopted herein;

(2) Included in the certified list filed in case nos. 77-4005 and 77-4020 is reference to a February 3, 1976, letter from Edward DeVaughn to all parties of record listing certain documents submitted to the FCC by AT&T. It is stipulated that none of the items listed in that letter or in the May 17, 1976, letter to Mr. DeVaughn from Mr. Catucci,

were considered by the Commission or its Staff in the decision-making process which preceded the Commission's January, 1977 Memorandum Opinion and Order, and that, as to the February 3, 1976, letter by Mr. DeVaughn, only items numbered 1, 3, 4 and 15 were considered by the Common Carrier Bureau prior to the Bureau Chief's March, 1976 Memorandum Opinion and Order.

Respectfully submitted,

JS/
Jack D. Smith, Esquire
Counsel for Federal Communi-
cations Commission
Washington, D. C. 20554
(202) 632-7112

Edward P. Taptich
Edward P. Taptich, Esquire
Counsel for Computer and
Business Equipment Manufacturers
Association
1150 Seventeenth Street, N.W.
Washington, D. C. 20036
(202) 296-1600

March 10, 1977

DOCKET FILE COPY
ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

c
FCC 69-1140
37286

In the Matter of)

Amendment of Part 61 of the Commission's)
Rules relating to Tariffs and Part 1 of the)
Commission's Rules relating to Evidence.)

DOCKET NO: 18703

NOTICE OF PROPOSED RULE MAKING

Adopted October 15, 1969

; Released October 17, 1969

By the Commission:

1. Notice is hereby given of the proposed rule making in the above-entitled matter.

2. Under the Commission's existing tariff rules, there is no requirement that customers be given any notice of tariff changes over and above the constructive legal notice given by the mere physical filing of the official tariff documents with us plus the posting of copies of tariffs at certain locations in the operating territory of the filing carrier where, in theory, the public may inspect them.

3. The aforementioned notice requirements may no longer be adequate, particularly in those cases where there are increases in charges, or where there is some change that effectuates discontinuance, reduction or impairment of service. The number and complexity of tariffs filed with us are growing and it appears likely that many customers that may be adversely affected thereby will not physically inspect the official copies on file with us or those posted in the operating territory of the filing carrier or otherwise learn of the filing of significant tariffs.

4. We propose in the attached notice a rule which would require the carrier to give additional notice to affected customers whenever tariffs are to be filed that involve increases in charges or any discontinuance, reduction or other impairment of service to any customer. At the outset, we would allow the filing carrier to choose the means most suitable under the circumstances for such notice in each case. This is because no one method would appear to be best under all circumstances. In some instances, for example, a newspaper ad may be sufficient. In other cases, some other method might be called for. Whatever method is used, the carrier would be required to state in its tariff transmittal letter what was done.

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5. In addition we propose to amend the provision requiring letters of transmittal to contain the reasons for all changes in charges or regulations plus a justification therefor if such change results in a rate increase. It has become apparent that many carriers are providing only the minimum amount of information necessary to comply pro forma with the rule. Our proposed rules will restate the original intent of that provision by making more explicit the types of information we feel are necessary for the Commission to effectively evaluate a rate and/or regulation change or new tariff offering. These rules will require the carrier to consolidate and present at the time of filing the tariff matter, the relevant data that the carrier has used in determining whether to make such change or new offering.

6. Under the existing provision it has become necessary for the Commission to request additional information of the carriers before the staff can evaluate tariff filings. Such requests and the time lag before compliance have created serious problems. Generally, the Commission is restricted by Section 204 of the Communications Act to a suspension period of 3 months before a properly filed tariff becomes effective. This coupled with the present 30 days notice requirement contained in the Rules and Regulations (47 C F R 61.58) allows the Commission only approximately four months to evaluate, if necessary suspend and investigate, go through hearings, and reach a decision on the lawfulness of a tariff. Because of the inadequacy of the information given by the carriers pursuant to the existing tariff provision, and the time necessary to get adequate information, the 4 months period has become totally inadequate. The proposed rules regarding information to be provided would cut the time period required for the evaluation process, and hearing procedure if necessary. In addition to a better information base, we propose to increase the notice requirement for tariff changes that constitute a rate increase from the present 30 days statutory notice to 60 days. Section 203(c) of the Act permits the Commission in its discretion, when good cause is shown, to modify the statutory notice requirement by a general order applicable to special circumstances or conditions. For the foregoing reasonings, we believe that such a modification is imperative if the Commission is to have enough time to perform its statutory duty.

7. It should be noted that the intent of these proposed rules is to reduce the number of tariff filings ordered for hearing. The rules envision that with better information available to the staff, many hearings might be avoided and that the public interest will be better served thereby.

8. The proposed rule concerning statistical data has a similar purpose. It is to be envisioned that much of the supporting data for new or changed tariff matter will be supported by scientific statistical studies. Yet the evaluation of these studies is time-consuming and in some cases impossible without the information that would be required by the rule. Again, since such information would already be in existence and readily accessible to the sponsor of a statistical study, we can see no hardship in the routine submission of such data. Further, to give application to this principle whenever statis-

3.

tical studies are to be used, we are proposing to make the admissibility into evidence of any such studies dependent upon the furnishing of the required information.

9. Authority for this proposed rule-making is contained in Section 4(i), 203(a), (b), and (d), and 204 of the Communications Act. Interested persons are invited to comment on the proposals herein. Comments shall be filed on or before November 25, 1969, and reply comments on or before December 5, 1969. In reaching its decision in this matter, the Commission may also take into account any other relevant information before it, in addition to the comments invited in this Notice.

10. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, an original and fourteen copies of all statements and briefs shall be furnished to the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Ben F. Waple
Secretary

Attachment - Appendix

A P P E N D I X

- I. In Part 1 of Chapter I of Title 47 of the Code of Federal Regulations, §1.363 is added, to read as follows:

§1.363 Introduction of statistical data.

(a) All scientific statistical studies, including but not limited to sample surveys, experiments, and econometric analyses, shall be described in a summary statement, with supplementary details added in appendices so as to give a comprehensive delineation of the plan and procedures undertaken, including, but not limited to, the definition of the sampling frame, the definition of the sampling units, the method of selecting the sample, the characteristics measured or counted, formulas used for statistical estimates, standard errors and test statistics, description of statistical tests; plus all related computations, computer programs, lists of input data and statements of result.

(b) If the evidence did not arise from a scientific statistical study, then a clear statement should be made regarding all underlying assumptions and judgments, and techniques of collection, estimation, and/or testing.

- II. In Part 61 of Chapter I of Title 47 of the Code of Federal Regulations, Sections 61.32, 61.33(a), and 61.58 are revised and Sections 61.21, 61.22, 61.38, 61.39, and 61.69(c) are added, to read as follows:

§61.21 Rate increase.

The term "rate increase" whenever used in this part means a change in tariff schedules which results in an increased charge to any of the carrier's customers.

§61.22 Rate decrease.

The term "rate decrease" whenever used in this part means a change in tariff schedules no part of which results in an increased charge to any of the carrier's customers.

§61.32 Publications to be sent to Secretary, FCC and commercial contractor.

Publications sent for filing shall be addressed to "Secretary, Federal Communications Commission, Washington, D. C., 20554." Concurrently with the filing of the publication with the Commission, the filing carrier shall transmit a copy of the publication to the commercial firm or firms with whom the Commission annually awards a contract to make copies of Commission records and offer them for sale to the public. Currently, the contractor is Cooper-Trent, Inc. 1130-19th Street, N.W., Washington, D. C. 20006.

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§61.33 Letters of transmittal.

(a) * * *

(Exact name of carrier in full)
Tariff Department,

(Post Office Address)

_____, 19____
(Date)

Transmittal No. ____
Secretary,
FEDERAL COMMUNICATIONS COMMISSION,
Washington, D. C. 20554.
ATTENTION: Common Carrier Bureau

The accompanying tariff (or other publication) is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended, issued by _____, and bearing _____
(Carrier)

FCC No. _____, effective _____, 19____.
(Suppl. No. _____ to FCC No. _____, effective _____, 19____.) (____ revised page _____ of FCC No. _____, effective _____, 19____.) (FCC Concurrence No. _____, effective _____, 19____), etc.
(Here give a statement describing the method of giving the additional notice required by §61.58.)

* * * * *

§61.38 Material to be submitted with letters of transmittal by filing carriers.

(a) Explanation and data supporting changes and/or new tariff offerings.

The material to be submitted for a tariff change considered a rate increase or a rate decrease, or for a tariff filing which is for a service not previously offered, shall include:
(1) an explanation of the changed or new matter, the reasons for the filing, and the basis of ratemaking employed, (2) economic data and/or information to support the changed matter including:
(i) a cost of service study for all elements of costs for the most recent 12 month period; and a similar study

3.

containing a projection of costs for a three year period beginning at the date of the filing of the changed tariff matter; and

- (ii) estimates of the aggregate effect of the changed matter upon the carrier's traffic and revenues from the service to which the changed matter applies and to the overall traffic and revenues of the carrier and an explanation of the basis for the estimates (including data as to past traffic and revenues and projections of the traffic and revenues for a three year period beginning at the date of the filing of the changed tariff matter).

(b) Working papers and statistical data.

- (1) There is to be furnished to the Chief, Common Carrier Bureau, upon filing of any tariff change considered a rate increase or decrease or for a tariff filing which is for a service not previously offered, two sets of working papers for use by the staff. These working papers shall contain the information underlying the data supplied in response to paragraph (a) of this section. A clear indication shall be made as to how the working papers relate to information supplied in response to paragraph (a) of this section.
- (2) All statistical studies will be submitted and supported in the form prescribed in §1.363 of this chapter.

(c) Exception.

If the tariff matter being filed by the issuing carrier contains charges, and classifications, practices, and regulations affecting such charges for a connecting carrier, it will be the duty of the connecting carrier to provide the data and/or information in paragraphs (a) and (b) of this section for its charges, and classifications, practices, and regulations affecting such charges on the date the tariff matter is filed with the Commission by the issuing carrier.

§61.39 Use in hearing proceeding of material submitted with letters of transmittal

For all rate increases, the material submitted with the filing shall be of such composition, scope, and format that it could serve as the carrier's complete case-in-chief in the event the rate increase is set for hearing to commence on a date within six months from the date of filing.

§61.58 Notice Requirements.

Every tariff, supplement, revised page and additional page of a tariff which does not constitute a rate increase, shall bear an effective date and, except as otherwise provided by regulation, special permission, or order of the Commission, shall give the full statutory notice of 30 days to the public and to the Commission regardless of whether or not changes are effected thereby. Every tariff, supplement, revised page and additional page of a tariff which does constitute a rate increase shall bear an effective date and, except as otherwise provided by regulation, special permission, or order of the Commission, shall give 60 days notice to the public and to the Commission regardless of whether or not changes are effected thereby. Notice shall be given primarily by filing with the Commission such proposed tariff publications. In addition to this notice, if the tariff publication proposes to increase any charge or to discontinue, reduce or otherwise impair service to any customer, the filing carrier shall take such steps as are appropriate under the circumstances to inform the affected customers of the impact of the tariff publication. Any period of notice required herein shall begin on and shall include the date the tariff is received by the Commission, but shall not include the effective date. In computing the notice required, Sundays and holidays shall be counted.

§61.69 Rejections.

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(c) Failure of the carrier to comply with any provision of this part will be grounds for rejection of the tariff material being submitted for filing.

May 30, 1975

A-22

Mr. John O'Boyle
Manager, Rates and Tariffs
ITT World Communications Inc.
67 Broad Street
New York, New York 10004

Dear Mr. O'Boyle:

This is in reference to letter of transmittal of ITT World Communications Inc. (ITTW) No. 1884, dated April 29, 1975 which transmits certain revised pages of ITT Tariff F.C.C. No. 43, scheduled to become effective June 2, 1975. These proposed revisions reduce from \$11,800 to \$8,550 the through rate applicable to leased Alternate Voice/Data (AVD) channels between the United States mainland (San Francisco, California) and the island of Guam (Agana), with appropriate lesser reductions for subspeed service.

Petitions to Reject these revisions were filed by RCA Global Communications, Inc. and Western Union International, Inc. in which they challenge, inter alia, the basis of ratemaking employed by ITT in developing the subject rates. After reviewing the arguments of the petitioners and the material supplied by ITT in support of the rate, we are of the opinion that the subject filing does not comply with Part 61 of the Commission's Rules and Regulations. Specifically, the data accompanying the revisions, which purport to comply with Section 61.38 of the Commission's Rules, 47 C.F.R. 61.38 (1973), are deficient in several material respects. First, the material supplied consists only of a summary of ITT's revenue requirements for U.S. - Guam service, with inadequate explanation and support of the elements included in the summary. Further, the material does not include the work papers and other statistical studies required by the rule to support representations made as to the cost elements included in the summary. See 47 C.F.R. §61.38(b). Third, while the cost-support data include projections of revenues, there is no indication of the effect of the rates on the revenues or revenue requirements as required by Section 61.38(a)(ii). For example, the return component (including taxes) claimed in the instant filing is approximately 2.9%, while ITT in other filings has claimed a rate of return of 20%. There is no explanation

Mr. John O'Boyle

of this disparity or indication that there may be present in this filing, factors which would justify such a significant departure from past practice. Finally, there is generally no explanation of the rate-making principles used in developing the rates or any indication of the time period covered by the rate development cost factors. Accordingly, it is not possible for us to assess and evaluate the allegations made by petitioners opposing the subject rates.

In view of the foregoing, in accordance with Section 0.91(h) of the Commission's Rules and Regulations, 417th Revised Page 1 and 18th Revised Page 30AA of ITT World Communications Inc. Tariff F.C.C. No. 43 are hereby rejected for failure to comply with Section 61.38 of the Commission's Rules and Regulations and returned herewith.

Sincerely yours,

Walter R. Hinchman
Chief, Common Carrier Bureau

Enclosures